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NO.

FILED
JUL 28 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2005

VICTOR A. RITA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION TO PROCEED IN *FORMA PAUPERIS*

The Petitioner, through his undersigned counsel, requests leave to proceed in *forma pauperis* in this Court pursuant to Rule 39 of the Supreme Court Rules and 18 U.S.C. § 3006A(d)(6). Petitioner was appointed counsel by the United States Court of Appeals for the Fourth Circuit pursuant to the Criminal Justice Act of 1964. No affidavit is attached inasmuch as the above-referenced court below appointed counsel for Petitioner under the Criminal Justice Act of 1964.

Respectfully submitted, this 28th day of July, 2006.

THOMAS N. COCHRAN
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Assistant Federal Public Defender
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Telephone: (336) 333-5455

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VICTOR A. RITA, JR.

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v.

UNITED STATES OF AMERICA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit Court of Appeals appellate review for "unreasonableness" has preserved *de facto* mandatory Guidelines, contrary this Court's ruling in United States v. Booker, 125 S. Ct. 738 (2005), by discouraging district courts from sentencing outside of the recommended guidelines ranges?

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IN THE

SUPREME COURT OF THE UNITED STATES

VICTOR A. RITA, JR.

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR

THE FOURTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in his case on May 1, 2006.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, for which review is sought, is United States v. Rita, No. 05-4674, 2006 WL 1144508 (4th Cir. May 1, 2006) (unpublished) (Appendix A). The district court judgment sought to be reversed is United States v. Rita, No. 3:04-CR-00105-6 (WDNC July 1, 2005) (Appendix B).

JURISDICTIONAL GROUNDS

Judgment was rendered in the United States Court of Appeals for the Fourth Circuit on May 1, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FACTUAL BACKGROUND AND STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

On April 28, 2004, the Petitioner/Defendant, Victor A. Rita, Jr., (hereinafter "Defendant" or "Rita") was charged in a five-count indictment. Counts One and Three charged the Defendant with giving false testimony to a grand jury in violation of 18 U.S.C. § 1623(a). Counts Two and Four charged the Defendant with making a false statement in violation of 18 U.S.C. § 1000(a)(2). Count Five charged the defendant with obstructing justice in violation of 18 U.S.C. § 1503. The Defendant appeared for arraignment on July 12, 2004, and entered a plea of not guilty to each count in the indictment. The Defendant proceeded to trial before a jury on November 8, 2004. At the close of the Government's evidence, the Defendant moved for an acquittal on Rule 29 grounds. The court denied the motion. On November 9, 2004, the jury returned a verdict of guilty on each of the five counts.

After the preparation of a presentence report (PSR), the Defendant filed a motion for a downward departure. The Defendant appeared for sentencing on June 7, 2005. The court imposed a sentence, within the recommended guideline range, of 33 months imprisonment on all counts to run concurrently, a term of supervised release of three years on each count to run concurrently, and a $500 special assessment. A judgment incorporating that sentence was filed on July 1, 2005, and an

amended judgment was filed on August 30, 2005. The judgment was amended to remove the date the Defendant was to report to the Federal Bureau of Prisons. The Defendant filed a premature, but timely *pro se* Notice of Appeal on June 17, 2005. The Fourth Circuit affirmed the district court's ruling in an unpublished opinion on May 1, 2006.

II. FACTUAL BACKGROUND

From March 2002 to February 2004, a Grand Jury of the United States in the Western District of North Carolina, along with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) conducted an investigation of InterOrdnance of America, Inc.'s sales of PPSh-41 machine gun parts kits. In January 2003, the Defendant bought two firearms parts kits from InterOrdnance, one of which was a PPSh-41 machine gun parts kit and the other was a RPK parts kit. On September 4, 2003, at 8:26 a.m., ATF Special Agent Bonnie Levin spoke to the Defendant on the telephone regarding returning a parts kit the Defendant purchased from InterOrdnance. He agreed to surrender the parts kit to her the following week.

A telephone call was placed from the Defendant's residence to InterOrdnance on September 4, 2003, at 10:05 a.m. The call lasted about four minutes. The Defendant stipulated that his wife and his son would testify that they did not place the call. On September 6, 2003, the Defendant shipped the PPSh-41 parts kit back to InterOrdnance. On or about September 10, 2003, the Defendant

voluntarily delivered an RPK parts kit to his attorney for surrender to Agent Levin. No letter was sent by the ATF to the Defendant requesting that he surrender his PPSh-41 parts kit to the ATF.

On October 27, 2003, the Defendant was called to testify before the Grand Jury. At that time, the Assistant U.S. Attorney (AUSA) conducting the grand jury investigation believed that the Defendant had assembled his PPSh-41 parts kit into fully functioning condition. In addition, the AUSA was aware of a report that InterOrdnance personnel, during a telephone call, had attempted to discourage another individual, David Lawson, from cooperating with the ATF in its effort to recover the PPSh-41 parts kit that Mr. Lawson had purchased from Interordnance. At the grand jury proceedings, the Defendant gave answers contrary to his literal actions. Those answers provided the basis for the charges of false testimony and obstruction of justice. Though technically inaccurate, the Defendant still believes the contextual sincerity of his answers was responsive to the questions posed. The jury concluded otherwise at trial.

III. FOURTH CIRCUIT OPINION

In an unpublished, *per curiam* opinion, the Fourth Circuit affirmed the Defendant's conviction and sentence. In its one-page analysis, the court stated "'while we believe that the appropriate circumstances for imposing a sentence outside the guideline range

will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range.' United States v. White, 405 F.3d 208, 219 (4th Cir.), cert. denied, 126 S. Ct. 668 (2005). Indeed, 'a sentence imposed within the properly calculated Guidelines range is presumptively reasonable.'" United States v. Rita, No. 05-4674, 2006 WL 1144508 at *1 (4th Cir. May 1, 2006) (per curiam) (unpublished) (citing United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006)). The court found "that the district court properly calculated the guideline range and appropriately treated the guidelines as advisory." Id. at *1. The court concluded that the within-guideline sentence was reasonable.

REASONS FOR GRANTING THE WRIT

In United States v. Booker, 125 S. Ct. 738 (2005), this Court proclaimed that, pursuant to Blakely v. Washington, 542 U.S. 296 (2004), the federal sentencing guidelines were unconstitutionally applied and that the proper remedy was to make them advisory rather than mandatory. 125 S. Ct. at 756-57. The Court in Booker also ordered sentencing courts to consider evidence relating to all the factors set forth in 18 U.S.C. § 3553(a). Id. at 764-65. In addition to the § 3553(a) factors, the courts must also consider the guidelines in determining a reasonable sentence. Id. at 764.

The circuit courts of appeals have split on the important issue of whether a sentence within the guideline range is presumptively reasonable. The First, Second, Third, and Ninth circuits have declined to find a sentence within the guideline range to be presumptively reasonable.[1] See United States v. Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (*en banc*) ("We do not find it helpful to talk about the guidelines as 'presumptively' controlling or a guidelines sentence as 'per se reasonable,'"); United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006) ("declining to establish any presumption, rebuttable or otherwise,

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[1]The Eleventh Circuit stated that a sentence within the guideline range is not "per se" reasonable in United States v. Talley, 431 F.3d 784, 787 (11th Cir. 2005); however, only in unpublished cases has the court extended that statement to say that a sentence within the guideline range is not "presumptively reasonable." See e.g., United States v. Plata-Mora, 173 Fed. Appx. 812, 812 (11th Cir. 2006) (unpublished).

that a Guidelines sentence is reasonable"); United States v. Cooper, 437 F.3d 324, 331 (3d Cir. 2006) (finding it unnecessary "to adopt a rebuttable presumption of reasonableness for within-guidelines sentences"); and United States v. Carty, --- F.3d ---, 2006 WL 1975895 (9th Cir. July 17, 2006) ("Although several circuits have afforded a presumption of reasonableness to within-the-Guidelines sentences, ... we have not adopted this position"). The reasoning is that making the guidelines presumptively reasonable comes too close to making them mandatory, contrary to the ruling in Booker. See Jimenez-Beltre, 440 F.3d at 518 ("Although making the guidelines 'presumptive' or 'per se reasonable' does not make them mandatory, it tends in that direction; and anyway terms like 'presumptive' and 'per se' are more ambiguous labels than they at first appear"); and Fernandez, 443 F.3d at 27 (same, quoting Jimenez-Beltre, 440 F.3d at 518).

On the other hand, the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and District of Columbia Circuits have found a sentence within the advisory guideline range to be presumptively reasonable. See United States v. Green, 436 F.3d 449, 457 (4th Cir.) (a sentence imposed within the properly calculated Guidelines range is presumptively reasonable), cert. denied, 126 S. Ct. 2309 (2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006) ("We agree with our sister circuits that have held that a sentence within a properly calculated Guideline range is presumptively

reasonable"); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006) ("We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness"); United States v. Lewis, 436 F.3d 939, 946 (8th Cir. 2006) ("A sentence falling within the applicable guideline range is presumptively reasonable"); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006) ("we join our sister circuits and hold that a sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness"); United States v. Dorsely, --- F.3d ---, 2006 WL 2034245 at *7 (D.C. Cir. July, 21 2006) ("We agree with our sister circuits that a sentence within a properly calculated Guidelines range is entitled to a rebuttable presumption of reasonableness"); and United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005) ("any sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness"). However, as illustrated below, the better view is that the guidelines are not, and should not be construed to be, presumptively reasonable.

Justice Scalia asked in Booker, "Will appellate review for "unreasonableness" preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges?" 543 U.S. at 313 (Scalia, J., dissenting.) The answer in the Fourth Circuit, and six other circuits, is "yes." The district

courts in the Fourth Circuit are commanded into following the "suggested" guideline range because the Fourth Circuit has found the guidelines presumptively reasonable and has overwhelmingly vacated and remanded cases where the sentence imposed was outside the suggested guideline range. Moreover, the inappropriate weight given to the guidelines was made abundantly clear by the Fourth Circuit in United States v. Moreland, 437 F.3d 424 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006). "[W]hen the variance[2] is a substantial one, ... we must more carefully scrutinize the reasoning offered by the district court in support of the sentence. The farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." Id. at 434. Such language likens unto the standard for departures under the guidelines, which were available before Booker, but which this Court did not find sufficient to save the guidelines from being unconstitutionally applied. See 543 U.S. at 234.

In Moreland, the lower court had imposed a sentence of ten years imprisonment, which was a two-thirds reduction from the bottom of the advisory guideline range. Id. at 427. The suggested guideline range was that of a career offender, 360 months to life in prison. Id. at 434. After considering the factors in 18 U.S.C. § 3553(a), the court justified the sentence of ten years based on

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[2]The Fourth Circuit refers to any sentence not within the advisory guideline range as a "variance sentence." Moreland, 437 F.3d at 432.

the nature and circumstances of the offense; it involved "a relatively small amount of cocaine base, was nonviolent, and did not involve a firearm." Id. at 435. In addition, neither of the defendant's prior offenses involved violence or firearms. The court believed that the defendant "ha[d] the ability and potential to become a productive member of society" based on his education and work history. Finally, the sentencing court believed that, compared with other career offenders, this defendant's current and past offenses were unlike the type and pattern of offenses seen in other career offenders. Id.

The Fourth Circuit found that the lower court committed clear error by the extent of its variance from the suggested guideline sentence. The court vacated the sentence and remanded for resentencing. Skeptical that the district court on remand would exercise its sentencing discretion appropriately, the Fourth Circuit engaged in appellate sentencing with a directive *that any sentence imposed be no less than twenty years imprisonment.* Id. at 437.

Likewise, in United States v. Hampton, 441 F.3d 284 (4th Cir. 2006), the court vacated and remanded for resentencing a case where the lower court imposed a sentence of probation rather than one within the 57 to 71 month suggested guideline range. "The [lower] court reasoned that because the offense caused no injury and because Hampton was employed and was caring for his two youngest

children, a sentence of no incarceration, but only probation, would adequately deter Hampton and others from violating the law and would adequately protect the public from Hampton." Id. at 288. The Fourth Circuit noted in the same sentence, as though it were one thought, that Hampton would not have been entitled to a downward departure under the guidelines and there was no basis for a reduction of near that magnitude in the record. Id. at 289. Notably, the court left for another day whether it would allow a variance based on a factor discouraged as a basis for departure under the guidelines Id., although its vacateur of Hampton's sentence effected that very principle.

Most recently, in United States v. Davenport, 445 F.3d 366 (4th Cir. 2006), the court vacated and remanded because the lower court gave a sentence more than three times the top of the advisory range. The appellate court found that sentence unreasonable and not supported by compelling reasons. Id. at 372.

In case after case, the Fourth Circuit has found reason to vacate and remand cases that imposed variances from the guideline range.[3] In United States v. Clark, 434 F.3d 684 (4th Cir.), cert. denied, 126 S. Ct. 2054 (2006), the court vacated and remanded because the lower court considered sentencing disparities between

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[3]In an unpublished case, United States v. Moreno-Mendoza, No. 05-4428, 2006 WL 1023848 (4th Cir. April 19, 2006), the Fourth Circuit vacated and remanded a sentence of 41 months imprisonment where the suggested guideline range was 15-21 months.

state and federal defendants to determine that a variance below the guidelines was reasonable. In United States v. Green, 436 F.3d 449 (4th Cir.), cert. denied, 126 S. Ct. 2309 (2006), the court vacated and remanded because the lower court determined that the career offender status overrepresented the defendant's criminal history. In United States v. Eura, 440 F.3d 625 (4th Cir. 2006), the court vacated and remanded because the lower court considered the sentencing disparity between crack and powder cocaine to determine that a variance below the guidelines was reasonable. In United States v. Perez-Pena, No. 05-5054, 2006 WL 1791697 (4th Cir. June 30, 2006), the court vacated and remanded because the lower court considered disparities between defendants receiving fast-track departures and those who did not, as well as the circumstances of that defendant justified a variance below the guidelines.

No published case and only one unpublished case, United States v. Woods, 169 Fed. Appx. 790 (4th Cir. 2006), has been identified by counsel where a variance from a properly calculated guideline range was upheld by the Fourth Circuit. In addition, no case has been identified by counsel where the Fourth Circuit found that a sentence within the guideline range was unreasonable. The impact of this precedent is to effectively make mandatory the "advisory" guideline range.

Putting greater emphasis on the guidelines is inconsistent with the structure of 18 U.S.C. § 3553(a). Admittedly, section

3553(a), while giving guidance to the judiciary, is a poorly drafted statute. Its purpose, however, is not difficult to understand. The introductory paragraph states:

> (a) **Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

The poor draftsmanship is apparent from the internally inconsistent treatment of §3553(a)(2). On the one hand, the paragraph directs sentencing courts to impose a sentence that complies with the purposes set forth in subsection (2), while on the other hand thereafter lists the subdivisions of subsection (2) as factors to be considered. Subsection (2) cannot operate simultaneously as both a "purpose" of sentencing and as a "factor" to be considered in fulfilling that purpose. Because section 3553(a) instructs courts to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of federal sentencing, the factors a sentencing court should consider are those set forth in subsections 3553(a)(1); (a)(3); (a)(4); (a)(5); (a)(6); and (a)(7).

Section 3553(a)(4) lists the advisory guideline range as one of the factors a court is to consider along with the five other factors in § 3553(a). Congress gave no single factor greater weight than any other. Thus, the circuit courts of appeals that have mandated that a sentence within the guideline range is

presumptively reasonable have misconstrued § 3553(a) by placing greater emphasis on one factor above all the others.

The Defendant contends that, due to the consistent Fourth Circuit rulings to sentence within the guideline range, the district courts in general, and the specific one in this case below, did not properly consider and give adequate weight to all the factors in 18 U.S.C. § 3553(a). As a result, the court imposed an unreasonable 33 month sentence which is greater than necessary to comply with the purposes of sentencing set forth in § 3553(a)(2).

The Defendant presented evidence relating to subsections 3553(a)(1), (a)(3), and (a)(6) that advocated imposing a lower sentence than that suggested by the sentencing guidelines. The Defendant presented compelling reasons that support a lower sentence.

The Defendant gave 24 years of commendable military service to the Marine Corps. He served in both the Vietnam conflict and the first Gulf War. During that time, he earned over 35 military awards and metals, some of which were awarded multiple times for different actions. Courts have recognized that even under the mandatory regime commendable military service warrants a shorter sentence. See United States v. McCaleb, 908 F.2d 176, 179 (7th Cir. 1990); United States v. Neil, 903 F.2d 564, 566 (8th Cir. 1990); and United States v. Pipich, 688 F. Supp. 191, 193 (D. Md.

1988). In fact, many of the Defendant's health problems, discussed below, stem from his exposure to Agent Orange in the Vietnam War and an injury incurred during his military service in the first Gulf War. Thus, the Defendant's distinguished military service to his country, including hazardous duty in two war zones, should mitigate in favor of a significantly shorter prison sentence.

The Defendant should receive a shorter sentence because he is likely to be a target in prison due to his civilian governmental service. The Defendant worked as an Immigration Asylum Officer with the U.S. Immigration and Naturalization Service from January 20, 1995 to February 28, 2003. From March 1, 2003 to November 30, 2003, the Defendant worked as an investigator for the Department of Homeland Security. In November 2003, the Defendant retired with more than 32 years of service to the federal government.

His duties with the federal government involved testifying for the government in numerous criminal and immigration matters, which resulted in criminal convictions. Due to those convictions, he has been threatened both directly and indirectly. As a result, the Defendant may have to spend most of his prison time in segregation. In Koon v. United States, 518 U.S. 81, 112 (1996), this Court recognized that a law enforcement officer's susceptibility to abuse in prison was a proper sentencing consideration and a proper basis for a downward departure from the guideline sentence. Likewise, the Defendant's assistance in obtaining convictions makes him

vulnerable to abuse in prison and rightly is the basis for a lower sentence.

One "purpose" of sentencing directs the district courts to consider whether the sentence "protect[s] the public from further crimes of the defendant." Section 3553(a)(2)(C). In this case, the Defendant is out on bond pending the outcome of his appeals. Thus, the district court necessarily determined that the Defendant does not pose a threat to the public. The fact the Defendant does not pose a threat to the public also mitigates strongly in favor of a reduced sentence.

Finally, the Defendant is 57 years old and suffers from numerous significant health problems, many related to his military service. Another "purpose" of sentencing is for the district courts to weigh the cost-effectiveness and the ability of the correctional institution to provide the Defendant with the medical care he needs. Section 3553(a)(2)(D).

As stated in the presentence report and accepted by the court:

> Victor Rita reports he is in poor physical health. His medical records are voluminous. He suffers from Type II Diabetes Mellitus and experiences periodic numbness in both feet, as well as problems with memory retention and eyesight. Furthermore, his right foot suffered severe trauma after being crushed by a tractor-trailer while serving in the military in Saudi Arabia. The defendant also has an enlarged prostate, acid reflux, and skin rashes and infections on his legs and neck. Mr. Rita notes that the skin rashes and infections are a result of his exposure to Agent Orange while serving in the U.S. Marine Corp[s]. He also suffers from . . . a herniated disk in his lower back, hyperlipidaemia (excess lipids in blood), and arthritis in his neck. The defendant has

> also been diagnosed with sleep apnea, which requires nightly use of a CPAP breathing machine. As a result of these health issues, he currently takes the following medications daily: Glyburide, Simvastatin, Lisinopril, Omeprazole, Terazosin, Metformin hydrochloride, Lovastatin, Sildenafil, Gemfibrozil, Senofibrate, Fenofibrate, and Alprostadil. He also applies the following medications to his skin rashes/infections: Fluocinonide Topical, Erthromycin Topical, and Flurandrenolide Topical.

As noted by the district court, not many people suffer from Agent Orange. In light of the effects of Agent Orange, rarely seen, and thus, rarely treated in the prison system, his need for a nightly breathing machine, and the many daily medications necessary to treat his various ailments, "a form of punishment such as home confinement might be equally efficient as and less costly than incarceration." USSG § 5H1.1 (policy statement). The Bureau of Prisons simply cannot provide the extent and efficiency of quality care that he has been receiving through the Veterans Administration.

As a veteran of two wars, Mr. Rita is entitled to better medical care than that provided in a prison setting. "Supporting our troops," even those whose mistakes have resulted in a criminal conviction, deserves more than references to bumper stickers. One true way to support the men and women who protect our country by going to war and suffering injuries and illness as a result of that service, is to take that service into real consideration if later in life they make a mistake. Mr. Rita's mistakes were not violent and are not likely to be repeated. He is 57 years old and suffers

daily as a result of serving in those two wars. Time in prison will simply aggravate his health problems because of the decrease in the quality of care.

As a society, we are indebted to Mr. Rita for his service to our country, both in and out of the military. One way to repay that debt is to balance his 32 years of commendable service and the resulting health affects against the nature of his crimes. The scales weigh heavily in his favor. Considering this man's history and circumstances and the limited and non-violent nature of his crimes, he simply does not deserve to spend nearly three years in prison. At the very least, he deserves to be sentenced under a system that does not make the federal sentencing guidelines presumptively reasonable and *de facto* mandatory.

Due to the importance of this question and the split among the circuit courts of appeals, the Defendant asks that this Court grant certiorari and hold that it is error to find that a sentence within the advisory guideline range is presumptively reasonable. Such a standard makes the guidelines, in reality, mandatory, and consequently, unconstitutional pursuant to Booker. The Defendant asks that his case be remanded for resentencing under a system where the guidelines are truly advisory, and thus, constitutional.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court grant his petition for writ of certiorari, vacate the Fourth Circuit's opinion, and remand his case with instructions to vacate his sentence and remand for resentencing.

This the 28th day of July, 2006.

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APPENDIX

United States v. Rita, No. 05-4674
(4th Cir. May 1, 2006) (unpub. decision) . . . . . Tab A

United States v. Rita, No. 3:04CR105,
(W.D.N.C. July 1, 2005) (judgment) . . . . . Tab B

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-4674

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

VICTOR A. RITA, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. William L. Osteen, District Judge. (CR-04-105)

Submitted: April 27, 2006 Decided: May 1, 2006

Before NIEMEYER and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Thomas N. Cochran, Assistant Federal Public Defender, Greensboro, North Carolina, for Appellant. Gretchen C. F. Shappert, United States Attorney, Matthew Martens, Assistant United States Attorney, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Victor A. Rita appeals his jury conviction and sentence on charges of perjury, obstruction of justice and making false statements, in violation of 18 U.S.C. §§ 1623(a), 1001(a)(2), and 1503 (2000), respectively. Rita's sole issue on appeal is whether the sentence imposed by the district court was reasonable. Finding no reversible error, we affirm.

After the Supreme Court's decision in United States v. Booker, 543 U.S. 220 (2005), a sentencing court is no longer bound by the range prescribed by the sentencing guidelines. See United States v. Hughes, 401 F.3d 540, 546-47 (4th Cir. 2005) (noting after Booker, sentencing courts should determine the sentencing range under the guidelines, consider the other factors under § 3553(a), and impose a reasonable sentence within the statutory maximum). However, in determining a sentence post-Booker, sentencing courts are still required to calculate and consider the guideline range prescribed thereby as well as the factors set forth in 18 U.S.C. § 3553(a) (2000). Id. We will affirm a post-Booker sentence if it is both reasonable and within the statutorily prescribed range. Id. at 546-47. We have further stated that "while we believe that the appropriate circumstances for imposing a sentence outside the guideline range will depend on the facts of individual cases, we have no reason to doubt that most sentences will continue to fall within the applicable guideline range."

United States v. White, 405 F.3d 208, 219 (4th Cir.), cert. denied, 126 S. Ct. 668 (2005). Indeed, "a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'" United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006) (citing United States v. Newsom, 428 F.3d 685, 687 (7th Cir. 2005), cert. denied, 2006 WL 271816 (2006)).

We find that the district court properly calculated the guideline range and appropriately treated the guidelines as advisory. The court sentenced Rita only after considering the factors set forth in § 3553(a). Based on these factors, and because the court sentenced Rita within the applicable guideline range and the statutory maximum, we find that Rita's sentence of thirty-three months' imprisonment is reasonable.

We therefore affirm Rita's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

United States District Court
For The Western District of North Carolina

UNITED STATES OF AMERICA

V.

VICTOR A. RITA, JR.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:04CR105

USM Number: 19814-058
Denzil H. Forrester
Defendant's Attorney

FILED
CHARLOTTE, N. C.
AUG 30 2005
U. S. DISTRICT COURT
W. DIST. OF N. C.

THE DEFENDANT:

_ Pleaded guilty to count(s) .
_ Pleaded nolo contendere to count(s) which was accepted by the court.
X was found guilty on count(s) 1-5 after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Counts
18:1623(a)	Making false declarations.	10/27/03	1 & 3
18:1001(a)(2)	Making false statements and representations.	10/27/03	2 & 4
18:1503	Obstruction of justice	10/27/03	5

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, United States v. Booker, 125 S.Ct. 738 (2005), and 18 U.S.C. § 3553(a).

_ The defendant has been found not guilty on count(s) .
_ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay monetary penalties, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence: 8/15/05

Signature of Judicial Officer

William L. Osteen
United States District Judge

Date: August 30, 2005

Amended to remove report date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Counts 1 - 5: THIRTY THREE (33) MONTHS each count to run concurrently.

X The Court makes the following recommendations to the Bureau of Prisons:

1. Defendant be housed at an institution where he can receive medical treatment and medicines which he is required to take. The Court urges BOP to pay careful attention to Agent Orange or any condition which may affect housing him in an institution.
2. Because Mr. Rita is from Miami and medical issues have been raised the Court recommends that defendant be housed in an institution in the Southeastern United States as a secondary request.

_ The defendant is remanded to the custody of the United States Marshal.

_ The defendant shall surrender to the United States Marshal for this district:

_ At ____ On ___.
_ As notified by the United States Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

_ As notified by the United States Marshal.
_ As notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

_____
_____
_____
_____

Defendant delivered on _____ _____ To _____

At _____, with a certified copy of this Judgment.

United States Marshal

By

Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Counts 1 - 5: THREE (3) YEARS each count to run concurrently.

___ The condition for mandatory drug testing is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court and any additional conditions ordered.

1. The defendant shall not commit another federal, state, or local crime.
2. The defendant shall refrain from possessing a firearm, destructive device, or other dangerous weapon.
3. The defendant shall pay any financial obligation imposed by this judgment remaining unpaid as of the commencement of the sentence of probation or the term of supervised release on a schedule to be established by the court.
4. The defendant shall provide access to any personal or business financial information as requested by the probation officer.
5. The defendant shall not acquire any new lines of credit unless authorized to do so in advance by the probation officer.
6. The defendant shall not leave the Western District of North Carolina without the permission of the Court or probation officer.
7. The defendant shall report in person to the probation officer as directed by the Court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
8. A defendant on supervised release shall report in person to the probation officer in the district to which he or she is released within 72 hours of release from custody of the Bureau of Prisons.
9. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
10. The defendant shall support his or her dependents and meet other family responsibilities.
11. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other activities authorized by the probation officer.
12. The defendant shall notify the probation officer within 72 hours of any change in residence or employment.
13. The defendant shall refrain from excessive use of alcohol and shall not unlawfully purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as duly prescribed by a licensed physician.
14. The defendant shall participate in a program of testing and treatment or both for substance abuse if directed to do so by the probation officer, until such time as the defendant is released from the program by the probation officer; provided, however, that defendant shall submit to a drug test within 15 days of release on probation or supervised release and at least two periodic drug tests thereafter for use of any controlled substance, subject to the provisions of 18:3583(a)(5) or 18:3583(d), respectively.
15. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
16. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
17. The defendant shall submit his person, residence, office or vehicle to a search, from time to time, conducted by any U.S. Probation Officer and such other law enforcement personnel as the probation officer may deem advisable, without a warrant; and failure to submit to such a search may be grounds for revocation of probation or supervised release. The defendant shall warn other residents or occupants that such premises or vehicle may be subject to searches pursuant to this condition.
18. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed by the probation officer.
19. The defendant shall notify the probation officer within 72 hours of defendant's being arrested or questioned by a law enforcement officer.
20. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.
21. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.
22. If the instant offense was committed on or after 4/24/96, the defendant shall notify the probation officer of any material changes in defendant's economic circumstances which may affect the defendant's ability to pay any monetary penalty.
23. If home confinement (home detention, home incarceration or curfew) is included you may be required to pay all or part of the cost of the electronic monitoring or other location verification system program based upon your ability to pay as determined by the probation officer.

ADDITIONAL CONDITIONS: